Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1201

In The

Supreme Court of the United States

October Term, 1982

David C. Bintliff,
Cross-Petitioner,

v.

Chemetron Corporation,
Cross-Respondent.

BRIEF FOR CROSS-RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS LOSS
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4626
Counsel of Record for Cross-Respondent

Of Counsel:

JAMES G. PARK
VINCENT C. DELUZIO
CARL E. ROTHENBERGER, JR.
STANLEY YORSZ
Buchanan, Ingersoll,
Rodewald, Kyle
& Buerger, P.C.
57th Floor—600 Grant St.
Pittsburgh, Pennsylvania 15219

JOE H. REYNOLDS
LLOYD R. CUNNINGHAM, JR.
Reynolds, Allen & Cook
Incorporated
1100 Milam Building
16th Floor
Houston, Texas 77002

February 1983

QUESTION PRESENTED

Should findings of fact, made after a fully and fairly litigated seven-week trial, provide the basis for collateral estoppel where prior to entry of formal judgment on such findings the party to be estopped settles the first action expressly to evade the effects of collateral estoppel?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	3
Conclusion	4

TABLE OF AUTHORITIES

Cases:	PAGE
Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982)	*passim*
Cosmos Bank v. Bintliff, C.A. No. 67-H-590 (S.D. Tex. 1975)	*passim*
Rules:	
Sup. Ct. Rule 28.1	1
Miscellaneous:	
Restatement (Second) of Judgments §13 (1982)	3

No. 82-1201

In The

Supreme Court of the United States

October Term, 1982

DAVID C. BINTLIFF,
Cross-Petitioner,

v.

CHEMETRON CORPORATION,
Cross-Respondent.

REPLY FOR CROSS-RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Prior to trial in this case, Cross-Respondent, Chemetron Corporation,[1] moved that Cross-Petitioner Bintliff be collaterally estopped from relitigating certain factual issues adjudicated adversely to him in *Cosmos Bank v. Bintliff*, C.A. No. 67-H-590 (S.D. Tex. 1975). The trial court denied Chemetron's motion and Chemetron filed a cross-appeal. The Court of Appeals reversed and held Bintliff collaterally estopped from relitigating the particular facts on remand. *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1187-92 (5th Cir. 1982); A76-A86.

Cosmos Bank was another case arising out of the Westec stock scandal. On May 1, 1975, after a seven-week

1. *Rule 28.1 Statement:* Chemetron has one parent, Allegheny International, Inc. Its subsidiaries are all wholly owned.

non-jury trial in Houston, the district court entered a lengthy "Memorandum and Order" setting forth 221 findings of fact and 38 conclusions of law. Based on those findings and conclusions, judgment for over $700,000 was to be awarded plaintiff, Cosmos Bank, against Bintliff for violations of federal securities laws and common law fraud. Cosmos Bank filed its motion for judgment on May 9, 1975, and Bintliff filed his opposition on May 16, 1975. *Id.* at 1187-88; A76-A77.

On May 29, 1975, Bintliff's counsel wrote the United States District Clerk saying that Bintliff and Cosmos Bank would settle, but only if the trial judge would sign an order preventing the use of the extensive findings and conclusions in other litigation. *Id.* at 1187 n. 81; A76 n. 81. On May 30, Bintliff and Cosmos Bank filed a joint motion and proposed order of dismissal, which would have granted a new trial and set aside the findings and conclusions. The court refused to sign the proposed order because there was "no basis for a new trial." *Id.* at 1187 n. 82; A77 n. 82. The district court proposed a different order and stated that the court would act on plaintiff's pending motion for judgment unless the parties accepted the court's proposed order. The parties accepted and the court signed that order, which dismissed the case with prejudice and withdrew the findings and conclusions. *Id.* at 1187-88; A76-A77.

At trial in this case, Chemetron's proposed pretrial order contained 158 findings of fact applicable to its case taken from the 221 findings made by the *Cosmos Bank* court. However, the trial court in *Chemetron* refused to estop Bintliff from relitigating those facts. *Id.* at 1188; A77.

REASONS FOR DENYING THE WRIT

The issue raised by Bintliff's conditional cross-petition, simply put, is whether a litigant can evade the consequences of collateral estoppel by contriving a "settlement" after fully and fairly litigating factual issues and losing. The Court of Appeals held he could not:

> In this instance, the facts of Bintliff's activities found in *Cosmos Bank* have been found again by the jury in *Chemetron*. Thus, they have been twice fully litigated. That Judge Hannay felt he had rendered a fully litigated, fair and correct adjudication on the merits in *Cosmos Bank* is evidenced by his refusal to sign an order granting a new trial because such an order had "no basis" and by his threat to enter final judgment.
>
> • • •
>
> Tactically, he chose to litigate fully *Cosmos Bank*, risking an adverse decision. He lost on that risk, and only when he lost did he decide to settle, fearing offensive collateral estoppel. Yet now he seeks to avoid the consequences of that loss by elevating form over substance. He cannot have it both ways. The findings of fact against Bintliff in *Cosmos Bank* are sufficiently final to permit their use in this case. On remand, Bintliff should be collaterally estopped from relitigating those facts.

682 F.2d at 1191-92; A85-A86. The decision is limited to the peculiar facts of the *Cosmos Bank* situation. It presents no issue for certiorari. *See Restatement (Second) of Judgments* §13 and Comment g thereto (1982).

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS LOSS

1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4626
Counsel of Record for Cross-Respondent

Of Counsel:

JAMES G. PARK
VINCENT C. DELUZIO
CARL E. ROTHENBERGER, JR.
STANLEY YORSZ
Buchanan, Ingersoll,
Rodewald, Kyle &
Buerger, P.C.
57th Floor—600 Grant St.
Pittsburgh, Pennsylvania 15219

JOE H. REYNOLDS
LLOYD R. CUNNINGHAM, JR.
Reynolds, Allen & Cook
Incorporated
1100 Milam Building
16th Floor
Houston, Texas 77002

February 1983